No. 95-1456

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1995

SPARKY'S WATERFRONT SALOON, INC.,
Petitioner,

-against-

COSMOPOLITAN, INC.; H.E. LOCKHART MANAGEMENT, INC., as Successor in interest by merger of LOCKHART DEVELOPMENT CORP.; ARTHUR WITTY, Individually; ARTHUR WITTY REAL ESTATE; ST. THOMAS HISTORICAL TRUST; DEJONGH ASSOCIATES; ROBERT C. DEJONGH; ARMOUR ENTERPRISES, INC.; TOPA EQUITIES (VI) LTD,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI ON BEHALF OF RESPONDENTS H.E. LOCKHART MANAGEMENT INC., ARTHUR WITTY, Individually and ARTHUR WITTY REAL ESTATE

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QUESTIONS PRESENTED

1. Should the Supreme Court review the trial court's finding that the jury foreman was mentally competent at the time of jury service?

2. Must a court order a juror to undergo a psychiatric examination following a trial, upon the request of a disappointed litigant, when the court has conclusively determined that the juror in question was mentally competent at the time of jury service?

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STATEMENT OF THE CASE

The incident upon which Petitioner sued Respondents was a fire on the premises of Sparky's Waterfront Saloon ("Sparky's") on September 18, 1989, the day after Hurricane Hugo. (Appendix as filed with the Third Circuit, hereinafter referred to as "App.", A23). The manner in which the fire spread to Sparky's was an issue at trial. The jury found that each of Respondents was negligent, but also found that the Respondents' negligence was not a proximate cause of the damages claimed to have been suffered by Petitioner. (App. A3656-A3660).

Five months after the jury verdict, by ex parte correspondence dated November 11, 1994, counsel for Sparky's informed the trial court that the jury foreman, (hereinafter referred to as "Juror #8"), "saw fit to contact our client in St. Thomas recently and advise our client of certain information involving some of the jurors in this case". (App. A3807-A3808). Sparky's counsel further informed the trial court that he "advised [his] client that it would be appropriate to reduce [Juror #8's] information to a written affidavit to present to the Court." (App. A3707). Accordingly, attached to this correspondence was an "Affidavit" signed by Juror #8 in which certain allegations were made, including the alleged bribery of a juror and vague fears experienced by some of the jurors. (App. A3809-A3810). Following submission of this correspondence and documentation to

the trial court, several subsequent communications took place between the trial court and Sparky's counsel in which Sparky's counsel forwarded additional information allegedly bearing on issues of juror misconduct. (App. A3813-A3826). This information was then provided by the trial court to the U.S. Attorney's Office in St. Thomas, which in turn forwarded it to the Federal Bureau of Investigation ("FBI"). (App. A3830, A3839).

On December 20, 1994, the trial court held a telephone conference during which the trial court advised counsel for Sparky's and Respondents that the FBI had conducted an investigation and concluded that the alleged bribery of a juror was unsubstantiated. (App. A3864-A3865). The trial court further advised that the FBI report also raised what the trial court considered to be a delusional problem with one of the jurors, thus raising the issue of whether Juror #8 was mentally competent to serve on the jury. (App. A3865).

Although the FBI report concluded that the alleged bribery was unfounded, Sparky's orally moved for a new trial and/or further proceedings on the issues of jury tampering, unauthorized jury contact by third persons and the competency of Juror #8. (App. A4018). Respondents entered a standing objection on the record and in writing to further proceedings. (App. A4393, Memoranda of Law at Docket Entries 352, 353, 356, 358). Although the trial court then went so far as to

allow the submission of questions written by Sparky's counsel that were answered under oath by the juror who allegedly took a bribe and another individual allegedly involved, ultimately the court determined that the allegations of jury tampering were unfounded. (App. A4218, A4316, A4317, A4319, A4341, A4281-A4286).

With respect to the competency of Juror #8, the FBI report, which is dated December 1, 1994, states that Juror #8, during an interview on that date, made statements that Respondents Armour, Witty and DeJongh "are powerful business people in the community and members of a 'secret society' he identified as the 'Masons' ". (App. A3840). Juror #8 also made various statements concerning conduct he had observed as a result of his infiltration of Masons meetings. (App. A3845). When asked how he had been able to infiltrate Masons meetings, Juror #8 stated that he "had special powers which enabled him to make himself disappear", to "go through walls and to be able to fly", which he had acquired from "reciting ancient [E]gyptian chants from the book of 'M' ". (App. A3846). Juror #8 also discussed with the FBI agent in detail the facts, legal issues and instructions the jury had received with respect to the trial. (App. A3840-A3844). Juror #8 also later submitted answers to written questions drafted by Sparky's counsel which were consistent with his statements to the FBI agent concerning his powers.

(Petitioner's Petition for Certiorari, hereinafter referred to as "Petition", at P. 57a-64a, App. A4287-A4295).

From the beginning of the post trial proceedings, the trial court stressed the importance of proceeding with "great caution" and the exercise of "very careful, detailed controls" in the area of post verdict inquiry. (App. A3919). The trial court also stated that he had watched Juror #8 "carefully . . . through trial. I saw no problem with him, nor did I hear of any problem raised by anyone connected with the case, counsel, staff or anyone else". (App. A4390). The trial court recognized that Juror #8's fellow jurors had selected him as foreman, and that he asked several intelligent questions during the trial. (App. A4390). The trial court also noted that Juror #8 ran for elected office in November of 1992 and again in November of 1994 without any suggestion of incompetency being raised. (App. A4390, Board of Elections records at Docket Entry 362). The trial court stressed that the final determination of competency was a matter for the trial court, not for an expert. (App. A4389, A4659, A4661).

During the post trial proceedings which, the trial court stated went "way beyond what it would need to do" with respect to its exercise of discretion, (App. A4378), Juror #8 appeared before the trial court on numerous occasions. (App. A4311, A4313, A4347(b), A4359, A4367, A4375, A4387). The trial court, upon Juror #8's request, appointed counsel to represent him.

(App. A4313). The trial court stated that he watched Juror #8 closely during the appearances at the post trial proceedings. (App. A4390, A4519). Sparky's counsel, meanwhile, submitted a report dated December 29, 1994, by a psychiatrist Sparky's hired (App. A3959-A3961) who concluded, in part, that he, "would be seriously concerned about the extent of the contamination of [Juror #8's] thinking by his likely Paranoid Psychosis," but stated that an examination would be essential in order to lead to a more definitive diagnosis and opinion. (App. A3961). Taking all these things into consideration, the trial court stated during a further hearing held on January 13, 1995, that there was no indication that Juror #8 was incompetent during his jury service, and further stated the trial court's intent to terminate the post trial proceedings. (App. A4390-A4392).

Sparky's counsel then stated that Sparky's wanted to go back to its hired expert with the answers Juror #8 had given to the written questions for a follow-up opinion, which the trial court ultimately allowed. (App. A4402). Sparky's counsel then submitted a supplemental report from the psychiatrist Sparky's had hired which now concluded, based on Juror #8's answers to the written questions, that Juror #8 would be incompetent to serve as a juror. (App. A4422-A4430).

Sparky's counsel also began researching Juror #8's answers to both the questions on his juror

questionnaire and the questions he answered in the post trial proceedings, and submitted information to the trial court indicating that Juror #8 had given incorrect information regarding his educational and work experience, as well as information concerning the year of his divorce and whether he or his wife had initiated the divorce. (App. A4432 A4418-A4421, A4498-A4499, A4623, A4624). Based upon this additional information, the trial court indicated it's intention to appoint a psychiatrist to review the matter and to explore whether Juror #8 would voluntarily submit to an examination, although, "it's a close issue as to whether I should do it." (App. A4537-A4539). The trial court further stated that, assuming that he would have the power to order an examination in the event that Juror #8 did not voluntarily agree to do so, he "would not think in this case this Court would be prepared to exercise that power", that to do so would be "going, beyond a reasonable doubt, what I think I should do in terms of exercising discretion", because, "I don't think there is that kind of compelling need here." (App. A4539). The trial court advised that it would take any false statements which Juror #8 allegedly made into account in determining the ultimate issue of competency. (App. A4655).

Juror #8's court-appointed attorney advised the trial court that she would advise Juror #8 not to voluntarily undergo a psychiatric examination because,

based on her research, she saw no basis to overthrow the jury's verdict even if such an examination took place. (App. A4591-A4592). Juror #8, through his counsel, ultimately advised the trial court that he would not voluntarily undergo a psychiatric examination. (App. A4608). The trial court then stated its intention to appoint a psychiatrist and obtain a written opinion from him based upon the information at hand, including Juror #8's statements to the FBI, his written answers to voir dire questions and to the post trial questions propounded, the information obtained by Sparky's concerning the alleged inconsistencies in his voir dire answers, Sparky's expert's opinion, and applicable case law, and on January 20, 1995, entered an Order to that effect. (App. A4616-A4617, A4637-A4638). The trial court also ruled that both sides would have the opportunity to cross-examine the court-appointed psychiatrist. (App. A4616, A4637). The procedure which the trial court followed with respect to the court-appointed psychiatrist was agreed to by Sparky's without any objection being raised. (App. A4537-A4539, A4700-4702).

The report of Dr. Bruce Berger, the court-appointed psychiatrist states, in pertinent part, that there was no direct evidence that Juror #8 was suffering from hallucinations, incoherence, grossly disorganized behavior or significant social occupational dysfunction. (Petition at P. 67a, App. A4674). Dr. Berger also noted

the information provided to him had "significant limitations" for purposes of Juror #8's history from which a determination could be made as to whether Juror #8's current symptoms had been continuous or were intermittent. (Petition at P. 68a, App. A4674). Dr. Berger then listed factors which both mitigated towards, and against, the opinion that Juror #8 was incompetent during his jury service. (Petition at P. 68a-70a, App. A4674-A4675). Dr. Berger also stated that although he, "cannot disagree with [Sparky's expert's] theoretical assessment of [Juror #8's] state of mind", it was Dr. Berger's opinion that, "there are alternative theoretical formulations that could suggest [Juror #8] was competent. . . " (Petition at P. 70a, App. A4675-A4676).

A final hearing on the issue of the alleged mental incompetence of (Juror #8) was held on January 25, 1995, at which counsel for all parties and the trial court had an opportunity to question Dr. Berger concerning his report and his opinion. Dr. Berger reiterated the position he took in his written opinion that, based upon the information provided, he was unable to form a definitive opinion as to whether the juror in question was or was not competent to serve as a juror at the time of his jury service. (App. A4736, A4744, A4749, A4750, A4760, A4764, A4766, A4768, A4780). Dr. Berger repeated his assertion in his written opinion that there were alternative theoretical formulations to suggest

that Juror #8 was competent at the time of his jury service. (App. A4742-A4743.)

At the end of this hearing, the trial court found that Sparky's had not even come close to proving that Juror #8 was incompetent at the time of his jury service under either a clear and convincing standard or a preponderance of the evidence standard. (Petition at P. 8a, App. A4810). Additionally, the trial court stated that a preponderance of the evidence standard was "certainly" the least standard that Sparky's would have to bear. (Petition at P. 10a, App. A4812). The trial court further stated that if Respondents had to prove competency by a preponderance of the evidence standard they had done so. (Petition at P. 10a, App. A4813). The trial court stated that it did not take the opinion of Sparky's expert lightly, but that the trial court was of the opinion that Sparky's expert leapt from a diagnosis of psychotic illness to a conclusion of juror incompetence which was not a leap that Dr. Berger would make. (Petition at P. 8a, App. A4811).

The trial court reiterated its position that, applying applicable case law to the facts of the instant case, the trial court could have exercised its discretion not to have engaged in any post trial inquiry whatsoever. (Petition at P. 4a, App. A4805). The trial court again stressed its own observations of Juror #8 during the trial as well as during the post-trial proceedings, as well as the fact that no juror, court personnel or counsel

reported any odd, bizarre or peculiar behavior on the part of Juror #8. (Petition at P. 12a, App. A4769-A4776, A4815). The trial court found, beyond a reasonable doubt, that, "when the trial ended and [Juror #8] stood up as the foreman, he was clear, he seemed to be under complete control . . ." (Petition at P. 6a-7a, App. A4808). The trial court recognized that it must make the determination of competency, that the standard was whether or not Sparky's had shown incompetency during the relevant time period and that the burden of proof was clearly on Sparky's. (Petition at P. 7a, App. A4808-A4809).

The trial court found "no question" that Juror #8 was not insane, either closely before or during his jury service. (Petition at P. 12a, App. A4816) .The trial court stated that, while Juror #8 might be a liar or a con man, these factors did not add up to insanity. (Petition, at P. 13a, App. A4817). The trial court further found that, whatever problems Juror #8 had, they did not affect his jury service. (Petition at P. 14a, App. A4819). The trial court stated that Sparky's arguments in this regard were not persuasive, and that Sparky's had not proven incompetency by a wide margin. (Petition at P. 14a-15a, App. A4819). Accordingly, the trial court entered an order denying Sparky's motion for a new trial in its entirety. (Petition at P. 18a, App. A4819-A4820).

ARGUMENT

A competent jury heard and decided this case. Sparky's allegation that the jury foreman was incompetent at the time of his jury service is not supported by the evidence. The trial court's inquiry into the matter, including the retention of a court-appointed expert, was thorough and not in error. Sparky's was given repeated opportunities by the trial court to present evidence in support of its position. The trial court correctly determined that the juror in question should not be required to submit to a psychiatric examination, and the trial court applied the proper standards of law both with respect to the form of the inquiry conducted by the trial court and the determination of competency.

A post verdict inquiry into alleged juror incompetence is allowed only when an extremely strong showing of incompetency has been made. Tanner v. United States, 483 U.S. 107, 126 (1987). A litigant's constitutional right to an unimpaired jury is protected by several aspects of the trial process, including voir dire examination, and observations by the court, by counsel and by court personnel. Id., 127. Moreover, jurors are observable by each other, and may report inappropriate juror behavior to the court before they render a verdict. Id. In the instant case, no one observed or reported any unusual or inappropriate behavior on the part of Juror #8 during the course of a lengthy trial.

Furthermore, it is well settled that only clear evidence of a juror's incompetence to understand the issues and to deliberate at the time of his service requires setting aside a verdict. United States v. Dioguardi, 492 F.2d 70, 78 (2nd Cir. 1974), cert. denied, 419 U.S. 873 (1974); United States v. Hall, 989 F.2d 711, 714 (4th Cir. 1993); United States v. Vargas, 606 F.2d 341, 345 (1st Cir. 1979). Only when proof of an adjudication of insanity or mental incompetence closely in advance of the time of jury service, or proof of a closely contemporaneous and independent post trial adjudication of incompetency, have courts conducted hearings to determine whether the disability in fact affected the juror at the time of trial. United States v. Dioguardi, 492 F.2d at 80.

In the instant case, there is no proof of an adjudication of insanity of Juror #8 closely in advance of his jury service or of a closely contemporaneous and independent post trial adjudication of insanity. There is no evidence that Juror #8 was anything other than alert and attentive during his service, nor is there any evidence of any unusual behavior on his part during his service, or that he was incapable of ably serving. Nevertheless, the trial court did conduct lengthy and extensive post trial proceedings. The trial court ultimately found, based on all the evidence as well as its own observations, that Sparky's fell far short of proving the incompetency of Juror #8.

The Second Circuit's opinion in Sullivan v. Fogg, 613 F.2d 465 (2nd Cir. 1980), relies upon the same principles enunciated in Dioguardi, requiring an independent adjudication of incompetency of the juror in question close to the time of jury service. 613 F.2d at 466. However, Sullivan held that a sufficient showing of incompetency had been shown to justify a further inquiry by the trial court, and that the defendant should have had an opportunity to cross-examine a court-appointed psychiatrist concerning the psychiatrist's conclusions about the juror's mental competence. 613 F.2d at 467-468. The Second Circuit in Sullivan did not ultimately hold that the juror at issue was incompetent. In the instant case, the trial judge held an evidentiary hearing which included allowing both sides to cross-examine the court-appointed psychiatrist concerning his conclusions about Juror #8.

Furthermore, the juror whose competence was at issued in Sullivan willingly submitted to an examination. 613 F.2d at 468. Contrary to Petitioner's assertions on Page 12 of its Petition, there is no statement in Sullivan v. Fogg to support Petitioner's claim that a trial judge has the authority to order a juror to undergo a psychiatric examination where the juror has refused to do so voluntarily. Nor does Petitioner cite any authority which holds that a trial judge has the authority to, or under the fact and circumstances of a given case was required to, compel a juror to undergo a

psychiatric examination when the juror has refused to do so voluntarily.

It is well-established that the trial judge has discretion to decide how to deal with a situation in which there is an allegation of jury misconduct. United States v. Simone, 14 F.3d 833, 838 (3rd Cir. 1994). This includes the determination whether to hold a post-trial hearing. Id., citing United States v. Gilsenan, 949 F.2d 90, 96-97 (3rd Cir. 1991), cert. denied, __ U.S. __, 112 S. Ct. 2971 (1992). In Gilsenan, the Third Circuit stated that "a hearing need not be held at the behest of a party whose allegations if established would not entitle it to relief." 949 F.2d at 97. In the absence of substantial if not wholly conclusive evidence of incompetency, courts have been unwilling to subject a juror to a hearing on his mental condition merely on the allegations and opinions of a losing party. United States v. Pellegrini, 441 F.Supp. 1367, 1370 (E.D.Pa. 1977), aff'd 586 F.2d 836 (3rd Cir. 1978), cert. denied, 439 U.S. 1050 (1978).

Once the trial court has determined that a hearing should be held, the trial judge has discretion in determining the nature and extent of the hearing. United States v. Boscia, 573 F.2d 827, 831 (3rd Cir. 1978), cert. denied, 436 U.S. 911 (1978), reh'g denied, 438 U.S. 908 (1978). This discretion of the trial court includes the form of any hearing to be held where allegations concerning the mental competence of a juror are at issue. Sullivan v. Fogg, 613 F.2d at 468. When the

possibility of juror incompetence comes to the court's attention, but the juror's disability is not obvious, the court is obliged only to conduct some hearing or inquiry. Clemmons v. Sowders, 34 F.3d 352, 355 (6th Cir. 1994).

Competency to sit on a jury is a determination within the broad discretion of the trial court and will be tampered with only upon finding an abuse of that discretion. Id. Likewise, the Fourth Circuit has stated that, "this Court considers a district court's determination of juror competency to be a finding of fact, which will not be overturned absent clear error," United States v. Gray, 47 F.3d 1359, 1366 (4th Cir. 1995), citing its earlier decision in United States v. Hall, 989 F.2d 711, 714 (4th Cir. 1993).

Likewise, the Third Circuit has stated that, in determining the competency of a criminal defendant, the final determination of competence or lack thereof is a finding of fact subject to a clearly erroneous standard of review. United States v. Renfro, 825 F.2d 763, 766, n.4 (3rd Cir. 1987). A district court's order denying a new trial is reviewed to determine whether the court abused its discretion. United States v. Gilsenan, 949 F.2d 90, 95 (3rd Cir. 1991).

In the instant case, no evidence was submitted suggesting that Juror #8 had ever sought or received psychiatric treatment. The sole basis of his alleged incompetence were his statements on a single occasion

to the FBI agent, his answers to the written questions propounded by Sparky's counsel, and the allegations that he falsified various answers.

Moreover, there were lengthy post trial proceedings, the format for which was consented to by Petitioner. These proceedings included giving the parties the opportunity to cross-examine the court-appointed psychiatrist, following which the trial judge concluded that the juror was not incompetent and that no further proceedings were warranted. The court did not find, as asserted by Petitioner on page 6 of its Petition, that Juror #8 was "severely delusional", nor did the trial court find, as asserted by Petitioner in its Question Presented No. 1, that Juror #8 "suffered from a psychotic illness". Rather, the trial court held that Petitioner did not come close to proving, by either a clear or convincing standard or a preponderance of the evidence standard that Juror #8's "mental disease and the like that he may have" and "views and convictions" affected Juror #8's ability to competently serve as a juror. (Petition at P. 11a, 14a).

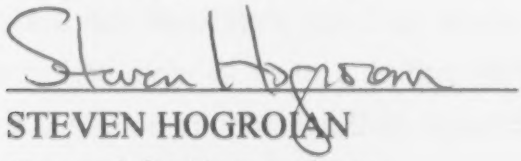
To the contrary, the trial court affirmatively found that this did not affect his jury service. (Petition at P. 14a, App. A4814, A4819). Furthermore, the trial court found that if Respondents had to prove competency by a preponderance of the evidence, they had done so. (Petition at P. 10a, App. A4813).

CONCLUSION

The trial court correctly interpreted and applied applicable law to the issues raised by Petitioner. The trial court carefully and thoroughly investigated and considered the issues raised by Petitioner and conclusively determined that Jury #8 was competent at the time of jury service.

Accordingly, for the forgoing reasons, Respondents H.E. Lockhart Management, Inc., Arthur Witty, Individually, and Arthur Witty Real Estate, respectfully request that the Petition for Writ of Certiorari be denied.

Respectfully submitted,



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April 6, 1996

STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

The Lockhart Companies, Inc. is the parent company of Respondent H.E. Lockhart Management, Inc. There are no nonwholly owned subsidiaries of Respondent H.E. Lockhart Management, Inc.